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JUDICIAL REPEAL OF THE STATUTE OF FRAUDS.

THE Statute of Frauds is ostensibly a measure to prevent frauds, whether the frauds be intentional, through the medium of false swearing, or accidental, as the result of defective memory. In either view of the matter, the statute is remedial, and is generally professed to be construed, as it should be, to effectuate this purpose. Its provisions are readily observed, and through all the years that it has been upon the statute-book it has undoubtedly proved to be a great instrument of justice. But courts sometimes yield to the appeal made to their sympathies by the exigencies of special circumstances, and in this way there has gradually developed upon this "bulwark of jurisprudence" a parasite, strangely coddled and nurtured by judges, who have allowed themselves from time to time to be carried away by prejudice from these special circumstances. And then the plain terms of the statute are ignored, and the very wholesome purpose of its enactment disregarded. This parasite is the so called doctrine that inasmuch as the statute was intended to prevent frauds, and not to assist in perpetrating them, it should not be allowed to become, according to the now popular phrase, an instrument of oppression, instead of one of defence. It will be found that this backsliding has led to numerous distinctions and exceptions, by which the beneficent aims of the statute have been often neutralized, and its very design often frustrated. These lapses are generally to be found instanced in cases where one of the parties to a contract has partly or wholly performed his part of the oral agreement, so that, if no remedy at all were provided for the party performing, the party receiving the benefit of this partial or complete performance would be said to use the statute as an instrument of oppression to retain his advantage, and therefore, it is argued, the statute should not be allowed to be interposed as a defence at all. The readiest answer to such an argument is, of course, a reference to other instances, where the law, as a matter of policy, considering only the greatest public benefit in the largest number of cases likely to arise, permits of defences that under exceptional circumstances appear arbitrary and selfish, and that also may permit to the

defendant the retention, without compensation, of some advantage received from the plaintiff, and to secure which compensation the plaintiff has neglected some precaution. Apt illustrations of this argument are found in the defences allowed by the Statute of Limitations and the Usury Laws. But we have not yet come to the point of claiming that these statutes shall not be used as instruments of oppression, no matter what advantages are obtained by defendants in pleading them.

As an example of the charge that courts are falling away from the letter as well as the spirit of the Statute of Frauds may be cited the ordinary case of an express oral contract of employment, which, by its terms, is not to be performed within a year of its making, where the employee has entered upon the service and has partly performed it. Here, it is sometimes argued that the employee should be allowed to recover damages, as for a breach of the express contract of employment, whether the wrong complained of be the non-payment of wages or the wrongful discharge. This doctrine of part performance can hardly be said to have yet been generally established. The courts seem rather to be tending to this point, than to have yet thoroughly attained it. But there are certainly some decisions and numerous dicta to this effect, and the progress towards the adoption of the doctrine is probably being made unconsciously. There is danger that, if the true student of the law do not seasonably protest, we shall have a repetition of the development of the law of contracts made for the benefit of third persons, where it was suddenly realized that we had outgrown the necessity of privity, and a doctrine that is unsound and impossible to accurately determine has come to the point of being almost universally acquiesced in. The Statute of Frauds declares that exceptions shall be made in the case of contracts for the sale of personal or real property, to the extent that certain kinds of part performance shall take the contracts out of the statute. This must be deemed a declaration that no other kind of part performance shall have that effect as to such agreements, and no kind of part performance as to any others.

It is sometimes contended, by way of apology, that the greater number of instances in which part performance on the part of the plaintiff has been permitted to take the case out of the statute are to be distinguished on the theory that a debt had been created by this performance, or, as it is sometimes said, a condition has been brought about from which the law will imply the promise to pay,

unaffected by the statute. That is to say, the statute continues to be a prohibition so far as the express contract is concerned, but an obligation is created, in order, as it were, that equity may be done, as in the case of the so-called equitable action for money had and received by the defendant to the plaintiff's use, which the law then, whether he will or no, makes the defendant promise to pay to the plaintiff. It is always a strange spectacle to see the law protect a plaintiff against the consequences of the law, for that would seem to be the effect of implying a contract, where one has been expressed, that through the fault of the plaintiff himself is not enforceable. It is the case of a statute shocking the conscience of the Chancellor. In another branch of the law we find the time-honored maxim that the expression of one thing is the exclusion of every other. If, then, the parties to an express agreement enter upon its performance, even though by the terms of the statute the agreement be not enforceable, how is there room for the presumption that the parties have made for themselves some other and different agreement than the actual one expressly made? But then this may be only another of our legal fictions; a trick to evade the law. The only answer made to this objection is, that the recovery is on a promise implied by law, and not on a promise implied in fact, which may be a distinction without a difference.

The question then arises as to what shall be the form of the agreement that is implied. It is said in many jurisdictions that the terms of the express agreement are competent evidence on the question of the extent of the implied obligation; the rule being differently stated by different courts. Sometimes it is said that the terms of the express agreement *tend* to prove the extent of the obligation imposed upon the defendant by implication of law; at others, that they prove it *prima facie*, and again at others, that they prove it *conclusively*. It would seem, however, that none of these theories can be maintained in principle without entirely losing sight of the purpose of the statute. If the express oral agreement is condemned by it, in order to exclude parol testimony of its terms, as exposed to the danger of perjury or defective memory, why should parol testimony as to its terms be admissible for any purpose? Where it is, sight is lost entirely of Lord Holt's reminder, that the design of the statute was not to trust the memory of witnesses beyond one year. It must not be supposed, however, that this heresy in any form is accepted in all jurisdictions, for there are some courts that still hold any evidence of the express con-

tract to be incompetent for every purpose. Indeed, in some States, the very terms of the statute would seem to cover the point, the provision being not only that certain contracts not evidenced by certain written forms shall be deemed invalid, but, in addition, that no oral evidence of their contents shall be introduced. Thus, for instance, the Civil Code of California (Section 1624) declares that "the following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing," etc. The Code of Civil Procedure of the same State (Section 1973), in that part of the Code which is supposed to represent a Code of Evidence, provides that "In the following cases the agreement is invalid, unless the same, or some note or memorandum thereof, be in writing," etc. "Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents." But I do not know of any case that raises the question in that form.

A rather curious distinction is suggested in the case of Kimmons *v.* Oldham,[1] where plaintiff and defendant were stockholders in a Turnpike Company, and agreed orally with each other that plaintiff should raise money for the use of the company on his own note, payable after a year, with the right to look to the defendant for contribution. The note was given according to agreement, and paid at maturity, and to the action to compel contribution the defendant pleaded that the contract was oral, and one which by its terms was not to be performed within a year. Plaintiff insisted that there had been part performance. Indeed, although it was characterized by the court as a case of part performance, it was in fact one of complete performance on one side, but no point seems to have been made of that. The court repudiates the doctrine of part performance for all actions at law, and as to suits in equity restricts the doctrine to bills for the specific performance of contracts for the sale of land, saying, incidentally, that when the failure to complete contracts of sale would operate as a "fraud," (here is an earmark of the heresy,) courts of equity may exercise a similar jurisdiction as to chattels. "One who has rendered services in execution of a verbal contract, which, on account of the statute, cannot be enforced against the other party, can recover the value of the services upon a quantum meruit." This doctrine, says the court, is not universal in its application, but is limited to cases in which the goods delivered, consideration paid, or services rendered

[1] 27 W. Va. 258.

inure to the benefit of the defendant. (Emery *v.* Smith, 46 N. H. 151, Acc.). Here, then, is a further ground of distinction, which, under the particular clauses of the statute that are applicable, seems to be unique. The implied promise to pay is not commensurate to what is given or done by the plaintiff, but to the direct benefit derived by the defendant himself; for, says the court in the same action, in sustaining the defence, the entire benefit of the payment made by the plaintiff inured to the benefit of the Turnpike Company. The plaintiff cannot recover upon the oral agreement, and the law will imply no promise on the part of the defendant to pay for what is not beneficial to him. "But if such promise could be implied, it would simply be a promise to answer for the debt of another, and would be void under the statute." (Query, Is not the benefit to the corporation a benefit to the stockholder?) Here again we have an illustration of the struggle of the courts to circumscribe a fallacious innovation, grafted upon the sound legal notions that are bred in the judicial bone.

When, however, we come to the case of contracts within this statute that have been wholly performed on the part of the plaintiff, we find, apparently, a preponderance of respectable authority on the side of the doctrine that the case is then taken entirely out of the statute. And this, too, in jurisdictions where the theory that part performance would have a similar effect would not be entertained for a moment. It might perhaps be urged at the outset, that, considering the theory of the statute, there is no difference at all, in principle, between complete and partial performance. Indeed, if on December 1, 1894, a contract of employment be made for one year, to begin on January 1, 1895, under which the employee is discharged on March 1, 1895, after he has served for two months without compensation, it would seem that there would be much less danger of defective memory, of unfaithful recollection as to the terms of the oral agreement, in a suit brought promptly by him after his discharge, than if he had served the full year and then been compelled to sue for his wages. And yet, probably, the weight of authority is in favor of sustaining an action on the express agreement in the latter case, and against sustaining it in the former case. This amounts to saying, still following the favorite expression of the courts, that to plead the Statute of Frauds in the case of complete performance is to use it as an instrument of oppression, while to plead it in the case of part performance is to interpose a shield against fraud and perjury. What

difference between the two cases is there but one of degree, and is it not true that the danger of false swearing is increased in proportion as the period of proving a contract by parol evidence becomes more remote?

The better doctrine would seem to be the one tersely stated in Broadwell *v.* Getman.[1] "An agreement is an entire thing, and where it cannot be completely executed on both sides until more than a year has elapsed, the case falls within the express words of the enactment. It is also within its spirit, for the mischief meant to be prevented by the statute was the leaving to memory the terms of a contract for a longer time than a year." And the true doctrine must be that an agreement, the whole of which cannot within a year be performed according to its terms, is within the statute, even if the act or promise, which is the consideration for the defendant's undertaking, may be or has been actually performed within the year.[2] The statute does not refer to agreements neither side of which can be performed within a year, so that the force of a learned commentator's distinction is not apparent when he says that, "in all the cases where the agreement has been held to be within the statute, the action was for the breach of that side of the contract that was not to be performed within the year."[3] This seems like an undue concern to vindicate the opinions of some of the courts; for except in the case of unilateral agreements (where the words "promise" and "agreement" are synonymous) this distinction appears to confuse the word "agreement," which is used in the statute, with "promise," which is only one side of the agreement. The distinction would of course be sound if the statute referred to "promises" not to be performed, etc., instead of "agreements." And whether the obligation rest upon an executed or an executory consideration, the danger of allowing its terms to be proved by parol evidence at remote periods is precisely the same.

These various refinements, distinctions, and exceptions also sorely puzzle the minds of other commentators, and when they endeavor to arrange the rules in an orderly system, they are led to strange incongruities. Thus, for instance, Reed, in his Treatise on the Statute, after commenting despairingly on the conflict of authority and lapse from principle, sums up with the statement that "The preponderance of American authority cannot be easily

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[1] 11 Denio, 88.

[2] Lapham *v.* Whipple, 8 Met. 59.

[3] Browne on Statute of Frauds, p. 352.

ascertained. It probably leans to the view that denies to anything less than complete execution of both sides of the agreement the effect of satisfying the statute." It occurs to one, however, to inquire how any question can arise under the statute, that is to say, how any question can arise in a practical form in a judicial proceeding, when both sides of the agreement have been performed. Nevertheless, it is the fact that there have been such cases involving the question, and the apparent paradox disappears.

In Adams *v.* Fitzpatrick,[1] it was fairly held that a contract, originally void under the Statute of Frauds, becomes valid upon performance. Plaintiff had contracted to enter defendant's employ for a period in excess of a year at a certain yearly salary. The contract was oral, but fully performed on both sides. Thereafter plaintiff continued in the employ of the defendant without any contract, for a period less than a year after the expiration of the original term, and until he was discharged. The court held that by the acquiescence of the parties, and by implication of law, the contract was to be deemed renewed for one year on the same terms as the oral contract, which, it was conceded, was within the prohibition of the statute. Says the court, "It is true that the original contract, so long as it remained executory, was void and unenforceable; but having been voluntarily performed by both parties, neither could afterwards be heard to allege its invalidity, and it controlled the terms of service and compensation under it as against both parties, as well as afforded an authority from which the intention of the parties in relation to a further contract could be inferred. In other words, after execution, it was to all intents valid." The same conclusion was arrived at in Tatterson *v.* Suffolk Manufacturing Co.,[2] where the court says that, "The terms of the contract, in the absence of express words, are to be ascertained not alone by what occurred within the year, but also from all that had transpired previously."[3]

And here, again, we find the courts forgetting the salutary reminder of Lord Holt, that the design of the statute was not to trust the memory of witnesses beyond one year, for the plaintiff is not restricted to showing what happened during the year of performance, but is permitted to show the terms of the original oral agreement, which will have been made more than a year before evidence of its terms can possibly be offered.

[1] 26 N. E. Rep. 143. [2] 106 Mass. 56.

[3] Sines *v.* Superintendents of the Poor, 58 Mich. 503 (Acc.).

These three decisions suggest a curious question, that might arise under the statute in those States in which the statute simply makes certain agreements invalid, without expressly forbidding the introduction of evidence as to the terms of the agreement. Let us suppose a case where A., on November 15, 1893, makes with B. an oral agreement for B.'s employment for one year, to commence January 1, 1894. On January 1, 1894, B. enters upon the performance of this agreement. On January 15, 1894, B. says to A., that inasmuch as the agreement of November had not been reduced to writing, he wishes it confirmed now that the year had begun to run, and so as to take it out of the statute; to which A. replies that that is satisfactory to him. In fact, the terms of the original oral agreement are not fully rehearsed in this conversation. B. is discharged without cause, and sues upon the agreement as made in January, 1894. To prove its terms he offers testimony as to both negotiations, the one of January 15, 1894, as well as that of November 15, 1893. Is the evidence as to the earlier agreement competent, as against the objection that it was not to be performed within a year, and should therefore have been in writing? This is of course not the common case of reference to some other writing in the written memorandum mentioned in the statute. The statute, let it be remembered, does not require the agreement itself to be in writing, for it sanctions the alternative of "some memorandum thereof," etc.[1] The agreement of January 15th is of course valid, for aught that the Statute of Frauds provides, but how shall its terms be proved? It would seem that to permit parol evidence of the oral agreement of November to be introduced (and that proof is necessary to make it sufficiently definite to be enforceable) would bring the case within the mischief, if not the letter of the statutory prohibition. And yet it is not at all clear that the New York, Massachusetts, and Michigan courts, which decided the above three cases, would so hold, if the question came before them.

The jurisdiction of courts of equity, in cases of actual fraud, may be admitted, both on principle and authority, to be ample and sufficient, and whether the Statute of Frauds or any other be involved. But the statute itself is as binding on a court of equity as on a court of law. The mere moral wrong of the defendant in interposing the defence of the statute (if the idea of immorality can ever be predicated upon the assertion of a legal right) cannot

[1] Leroux *v.* Brown, 12 C. B. Rep. 801.

by itself justify the interference of, or confer jurisdiction on, a court of equity. Circumstances might perhaps be conceived, in which, by intentional misrepresentation or other fraudulent conduct, compliance with the requirements of the statute has been prevented; but these are not the cases of part performance or complete performance of one or both sides of the contract that have been criticised. There should be, it would seem, in addition to the part performance, something in the attending circumstances to constitute a case of legal fraud.

It may be admitted that, if laws that do not approve themselves to the judgment of the executive are properly allowed to become a dead letter, courts may be excused for emasculating objectionable legislation. But so long as the aims of the Statute of Frauds continue, as they undoubtedly should be, to be regarded as beneficent, no excuse is apparent for repeal by indirection.

Jesse W. Lilienthal.